

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
07-EDC-1192

## DECISION

## APPEARANCES

**WITNESSES**

For Petitioners:                      Petitioner's mother  
S.S.  
Ms. S.  
*D.T.*, P.T. Ph.D.  
*M.B.*, Ph.D.

## **EXHIBITS**

For Petitioners: Exhibits 1 through 25, 27 through 30, 32 through 45 and 47 through 49.

This matter is before the Administrative Law Judge on Respondent's motion to dismiss the case pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure, made at the close of petitioner's evidence. After reviewing evidence presented in the case, the Court makes the following:

### **FINDINGS OF FACT**

1. Petitioner, (*Student*), by and through her parents, *Father* and *Mother* , filed a contested case petition on July 26, 2007, alleging that the Wake County Public School System (hereinafter "WCPSS") denied *Student* a free appropriate public education (FAPE). The petition asked that the Wake County Public School System be ordered to include an individualized aquatics element in *Student's* IEP at least three times a week.
2. Petitioner, in the Pre-Hearing Order submitted on December 5, 2007, identified six issues for the hearing as follows:
  - (1) Whether Petitioner was denied a free and appropriate public education by Respondent's failure to meaningfully consider medical and educational evidence that supports her need for an aquatics element in the Physical Education component of her IEP.
  - (2) Whether Petitioner was denied a free and appropriate public education by Respondent's refusal to consider the medical and educational evidence that supports the need for regular aquatics as essential to develop Petitioner's strength, stamina, and alertness in order to access her curriculum.
  - (3) Whether Petitioner was denied a free and appropriate public education by Respondent's failure to include aquatics as an integral component in Petitioner's Transition Plan as requested by Petitioner.
  - (4) Whether Petitioner was denied a free and appropriate public education by Respondent's refusal to provide Prior Written Notice documenting Petitioner's disagreement with the Plan adopted by the IEP team.
  - (5) Whether Respondent should be required to provide Petitioner with a regular aquatics program as essential to develop Petitioner's strength, stamina, and alertness in order to access her curriculum.
  - (6) Whether Respondent should be required to reimburse Petitioner for the expense of independent evaluations, attorney's fees and costs.

3. At the start of the hearing, Petitioner withdrew the portion of the sixth issue regarding reimbursement of costs of independent evaluations and agreed that the portion of the sixth issue concerning attorney fees and costs was not within the jurisdiction of the Office for Administrative Hearings.
4. Petitioner, born on \*\*\* 1989, is a student in the Wake County Public School System. Petitioner's parents report that she has been diagnosed with XX Syndrome. XX Syndrome is characterized by developmental delays, general low muscle tone and orthopedic abnormalities. *Student* is ambulatory but has poor balance.
5. XX Syndrome affects *Student* in several ways. It affects her ability to speak. She is non-verbal, but does babble unintelligibly. Physically, *Student* has hip dysplasia and wears orthotics that restrict the movement of her ankles. She has difficulty moving from a sitting position to standing. *Student* walks with a flat-footed gait.
6. Petitioner is severely to profoundly retarded. Mentally, Petitioner functions at the level of a one-year-old child. Petitioner is happy, sociable, loving and cooperative and is able to follow simple commands. She suffers from motoric seizures.
7. *Student* lived with her parents until she was 17 years old but now lives with a foster family.
8. *Mother* contacted school personnel beginning in January 2007 about her desire that *Student* have therapeutic swimming goals in her IEP. On February 6, 2007, *Mother* contacted Ms. S., a low incidence support teacher for Respondent, to follow up on the earlier contacts with the school system. On February 25, 2007, in anticipation of the meeting of *Student*'s IEP team on March 7, 2007, *Mother* sent an e-mail to the members of the IEP team attaching twelve pages of proposed IEP goals. Two of the proposed goals included an aquatics element.
9. In February 2007, Ms. S. had investigated the issue and reported to *Mother* that swimming is not part of the regular P.E. program and that she believed *Student*'s physical education needs could be met in other ways.
10. *Mother* spent a considerable amount of time contacting Ms. S. and Ms. J.L., a Senior Administrator for WCPSS, and others within WCPSS in anticipation of the March 2007 IEP meeting.
11. *Student*'s IEP team met on March 7, 2007. At the meeting, *Student*'s entire IEP was reviewed. The parents requested that aquatics be included as part of *Student*'s program.
12. Near the end of the meeting the parents presented a note on a prescription pad from *Student*'s orthopedic surgeon, Dr. Edmund R. Campion. The note stated: "*Student* has a neurologic impairment and a gait disorder. Her walking program is not effective for aerobic activity. Aquatics would be more beneficial for her and would help to develop a lifetime recreational leisure activity." *Mother* stated that she did not personally speak

with Dr. Champion, but communicated to his assistant that she wanted to accomplish water goals for *Student*. She conceded that Dr. Champion had not seen *Student* for over a year when he signed the note and had not performed a fitness evaluation of *Student*.

13. The team did not agree to incorporate individualized swimming goals into *Student*'s IEP. The IEP team's position on swimming goals was incorporated into the official minutes of the March 7 IEP meeting. *Father* and *Mother* knew at the March 7 meeting that Respondent had refused to offer *Student* individualized swimming goals and knew the reasons for the refusal given by IEP team members.
14. *Student*'s parents anticipated that the Respondent would not include an aquatics element in *Student*'s Adapted PE goals and had prepared a written response, which was labeled "Appendix Z" and attached to the minutes of the meeting. The written statement argued in part that an aquatics element was appropriate for both the Adapted PE and Transition components of the IEP.
15. Petitioner contends that Ms. J.L. was in control of the IEP meeting regarding the aquatics element and that no one else was free to participate in free and open discussions. This contention is not borne out by the other credible and reliable evidence.
16. At the conclusion of the March 7 meeting, *Father* and *Mother* requested that WCPSS complete a DEC-5 in order to memorialize the disagreement between the parents and the school system concerning the aquatics issue. WCPSS did not complete a DEC-5 at the conclusion of the meeting, but agreed to note in the minutes of the meeting the parent's disagreement and the fact that a DEC-5 was not executed.
17. The DEC 5 is a standard form used by school systems in North Carolina and titled "Prior Written Notice." This form constitutes a final agency action from which appeals rights arise. There is no place on this form for a parent, or anyone else, to note disagreement with an IEP meeting or other disagreement with school system action. It is a notification form.
18. Petitioner has placed considerable emphasis on, and alleged as procedural error, the fact that Respondent did not complete a DEC 5 at the conclusion of the IEP meeting in March 2007. This contention is without merit.
19. At the parents' initiative, physical therapist *Dr. D.T.*, Ph.D., evaluated *Student* in May 2007. *Dr. D.T.* has a Ph.D. in Pediatric Physical Therapy and is an Associate Professor in the Division of Physical Therapy at UNC, Chapel Hill, North Carolina. In her evaluation, *Dr. D.T.* actually questions the diagnosis of XX Syndrome, but there is no question about *Student*'s functional abilities.
20. The parents provided *Dr. D.T.*'s report to school officials in summer 2007. *Dr. D.T.* concluded that the aquatic environment is optimal (emphasis in original) for *Student*'s aerobic and muscular development. *Dr. D.T.* designed a fitness plan for *Student*

suggesting that *Student's* foster mother work with *Student* several times each week for 30-45 minutes on land (walking) and in the water (aquatics), attempting to keep *Student's* heart rate at an aerobic level. *Mother* admits that neither she nor the foster mother can perform the tasks for implementing the recommendations. Of the four recommendations for *Student* developed from *Dr. D.T.'s* evaluation, none have been implemented or followed as of the hearing.

21. *Dr. D.T.* testified for Petitioner by video deposition that *Student* did not need a swimming program in order to have an appropriate education.
22. By letter from Ms. J.L. dated June 25, 2007, Respondent gave Petitioner and her parents Prior Written Notice of its decision concerning *Student's* IEP, more particularly as pertaining to the request for aquatics. The letter states that it is to serve as the DEC 5 and comports with requirements for "prior written notice." The petition for the contested case herein was filed with the Office of Administrative Hearings on July 26, 2007.
23. During the 2006-2007 school year, Petitioner attended K. High School in a class for severely/profoundly mentally disabled students. In April 2007, an Individualized Education Program (IEP) team, including *Student's* parents, met and decided to change *Student's* placement to a classroom for trainably mentally disabled (TMD) students. In August of 2007, *Student* transferred to a TMD classroom at High School A.
24. *Student* is one of the lowest functioning students in the TMD classroom at High School A. The new class has greatly benefited *Student* by exposing her to higher-functioning mentally handicapped students. The new class has welcomed *Student* and her social skills have blossomed as she has interacted with and modeled the behavior of her classmates.
25. *Student's* interactions with her classmates at High School A are helping her prepare for her transition to post-school life. These transition goals include development of social and work skills, such as respecting the personal space of others, moderating her vocalizations, and working more independently.
26. Overall, *Mother* finds that *Student's* school setting and program is "fabulous" and "incredible."
27. By letter to *Father* and *Mother* dated August 14, 2007, Ms. N.S., the Director of Legal and Compliance for WCPSS, suggested that *Student's* IEP Team be reconvened to consider the request for aquatics in light of the recommendations made by *Dr. D.T.* as well as allowing team members to participate from *Student's* new placement at High School A. In the letter, Ms. N.S. asserts that she believes that the issue of aquatics has been properly considered but is willing to continue considering aquatics as an option.
28. The IEP team met on September 20, 2007, in a facilitated meeting. *Father* and *Mother* proposed that *Student* begin with two 20-minute sessions of swimming each week at a

private pool located approximately 20 minutes from High School A. *Student's* parents offered to pay the pool membership fee. There is no pool at High School A or on the campus of any other Wake County Public Schools facility.

29. At the facilitated IEP meeting on September 20, 2007, school team members agreed to look into the possibility of an individualized swimming program for *Student*. Specifically, the team discussed a proposal for *Student* to leave school at noon and return at 2 p.m. twice a week. *Mother* estimated that it would take 20 minutes each way for *Student* to travel to the private pool, 40 minutes for *Student* to change clothes before and after swimming and 40 minutes of swimming.
30. The facilitator, Ms. K.B., reduced the IEP Team's proposal to written form on a document entitled "Action Plan" a portion of which states:

"The LEA will consider releasing *Student* from school 2 days per week from P.E/logistics etc. to be considered. LEA will communicate decision to parents.

Reconvene IEP Team after decision to develop transition plan and Adapted PE goals."
31. All parties were in agreement at the September 20 meeting that Ms. N.S., special education administrator for Respondent, would investigate the feasibility of the proposal for *Student* to swim at private twice a week.
32. Ms. N.S. notified *Father* and *Mother* by letter dated October 10, 2007, that she had investigated the proposal and could not support adding an individualized aquatics program for *Student*. Ms. N.S. listed a number of objections to the proposed swimming program as follows: *Student* would miss at least two hours from her school day and contact with her peers, the latter being a major focus of *Student's* revised IEP; *Student's* transportation from the pool could cause logistical problems with afternoon buses; and private did not have a lifeguard on duty. Ms. N.S. proposed that an IEP meeting be reconvened so she could share the results of her investigation with the team.
33. At an IEP meeting on November 5, 2007, Ms. N.S. discussed the information she obtained in investigating the aquatics proposal. Dr. McPeak is an Adapted PE consultant retained by WCPSS, who visited the proposed site of the aquatics for *Student* and offered his opinion and various criticisms of the facility proposed to be used and the recommendations made by *Dr. D.T.*
34. *Father* and *Mother* felt as though they were taken by surprise by Dr. McPeak's opinions. They felt that the prior meeting which was facilitated provided them with a much more open and conciliatory meeting. Extensive minutes were made of the meeting, including the comments by Dr. McPeak.
35. The school members of the IEP team decided that an aquatics program was not necessary

to meet *Student's* fitness needs or that it is needed for FAPE.

36. At the November 5 meeting, *Father* and *Mother* asked that individualized swimming be included in *Student's* transition plan. Ms. N.S. invited *Father* and *Mother* to discuss *Student's* transition plan. Transition was mentioned several times during the discussion. *Mother* has made clear that aquatics are important to transition. During this meeting she stated that their transition plan to include aquatics would "tie it all together" and that *Student's* "future is in the pool." Ultimately, the transition plan was not fully discussed at the November 5 meeting, and it was decided to meet at a later date and further discuss transition.
37. Respondent has given full and meaningful consideration to adding the aquatics element to *Student's* IEP, including continuing to explore all options and consider information provided even after the petition in this contested case had been filed.
38. *Mother* testified that an aquatics program could serve *Student's* transition needs by preparing *Student* to work at an aquatic center, including cleaning the scum line around the top edge of the pool and otherwise tidying up the center.
39. *M.B.*, Ph.D., is a professor of adapted physical education at the University of Virginia, and testified as an expert witness in the field of adapted physical education. *Mother* had been in contact with *Dr. M.B.* since early spring, and she had spoken with him over 20 times by telephone. He had not seen *Student* or any of her records prior to November 24, 2007. *Dr. M.B.* evaluated *Student* for 45 minutes on November 24, 2007, and concluded she is able to run and is able to swim independently.
40. *Dr. M.B.* examined *Student's* abilities on a stationary bicycle, a rowing machine and her use of dynabands for strength training, documenting his observations with a video presentation. In *Dr. M.B.'s* opinion, *Student's* limitations interfered with her ability to use these devices to such a degree that no aerobic or muscle-strengthening benefit could be gained by their inclusion in an Adapted PE program for MCR. Primarily, this opinion was based on *Student's* either refusal or inability to grasp. Her inability to grasp also means that cleaning a scum line in a swimming pool is not a realistic plan for *Student*
41. *Dr. M.B.* recounted his observations in the video of his experience with *Student* in a swimming pool. In *Dr. M.B.'s* opinion, *Student* could possibly gain both cardio-vascular and muscle strengthening benefit from the inclusion of an aquatics element in her Adapted PE program.
42. *Dr. M.B.* stated that it is possible for *Student* to work on upper body strength by throwing a ball. *Dr. M.B.* testified that it is reasonable for *Student's* IEP team to consider the amount of time *Student* would lose from her primary educational program to swim twice a week at school. He also testified that it is appropriate for the IEP team to consider the amount of time *Student* would be removed from her less disabled and regular education peers to be able to participate in a swimming program by herself with her aide. *Dr. M.B.*

admitted that he did not know anything about *Student's* current classroom setting or anything about the peers in her classroom.

43. While *Dr. M.B.* questioned the appropriateness of some of the objectives on *Student's* IEP, he admitted that he was not aware of the specific modifications and adaptations that had been designed for implementation of *Student's* adaptive PE program.
44. *Dr. M.B.* is the author of a book entitled "A Teacher's Guide to Including *Students* With Disabilities in Regular Physical Education."
45. In his book and his testimony, *Dr. M.B.* described "adaptive physical education" as programs "that have the same objectives as the regular physical education program, but in which adjustments are made in the regular offerings to meet the needs and abilities of exceptional students."
46. Swimming is not part of the regular physical education program in the Wake County Public Schools. No Wake County exceptional children's program student has an aquatics component as part of adapted physical education.
47. *Dr. M.B.* testified that he was not aware that swimming is not offered as part of the regular education program in Wake County Schools. He also testified he did not know much about the pool that would be available for an aquatics program for *Student*
48. *Dr. M.B.* agreed that having a lifeguard on duty during *Student's* swimming would be critical.
49. *Dr. M.B.* testified that the Individuals with Disabilities Act requires an appropriate, not an optimal, education program.
50. *Student's* current IEP includes goals for walking and for increasing bilateral upper body strength. *Student* has worked toward her IEP goals for walking and increasing bilateral upper body strength during physical education time by walking with peers, playing basketball with peers and using stretchable bands with her teacher assistant, and pulling a cart loaded with magazines. *Student* appears to enjoy such activities and to participate in them willingly.
51. *Student* enjoys being with her peers in the current class placement and learns by watching the behavior of her classmates.
52. *Student's* current class placement and transition activities are exposing her to a variety of potential job placements and to skills that will assist her in eventual job placements. Trying many different job placements is part of *Student's* transition plan. It is inappropriate and not in *Student's* best interest to focus on only one transitional job for *Student* such as working at a swimming pool. With approximately four years of public school services available for *Student*, it is in *Student's* best interest and to maximize her



transition potential to continue to explore and work on her strengths.

53. *Student* gains significant benefits from exposure to non-disabled peers and to a variety of job sites. *Student* has enjoyed her various vocational placements. Development of social skills is *Student*'s most important transition preparation.
54. *Student*'s teachers have developed in-class activities to prepare her for her transition from school, including delivering mail, watering plants, using a safety cutter, dusting books and recycling.
55. It is important to expose *Student* to many different environments and tasks to better understand her strengths and weaknesses.
56. Aquatics is not an appropriate focus for a transition plan for *Student* because she would miss much class time in exchange for a relatively short time in the pool and because her upper body strength needs can be met in adapted P.E.
57. By missing lunch to take part in swimming, *Student* would miss important instruction on topics including communicating desires, opening milk cartons and putting utensils down between bites.
58. *Student*'s teachers who served on her IEP team noted that *Student* has made great progress in a short period of time in her new placement with higher-functioning classmates. These teachers are concerned that time devoted to an individualized swimming program would unduly limit her contact with classmates and impair her current progress.

### **CONCLUSIONS OF LAW**

1. The IDEA, 20 U.S.C. § 1400 et seq., is the federal statute governing education of students with disabilities. The federal regulations promulgated under the IDEA are codified at 34 C.F.R. Parts 300 and 301.
2. The controlling state law for students with disabilities is Chapter 115C, Article 9 of the North Carolina General Statutes, and the corresponding state regulations, including sections 1501-1508 of the State Policies Governing Programs and Services for Children with Disabilities.
3. *Student* is a student with a disability for purposes of the IDEA and corresponding state law. She is currently identified as a student with a severe/profound mental disability.
4. Respondent is required under federal and state law to make special education and related services available to *Student* and to offer her a free appropriate public education (FAPE) as that term is defined under the IDEA and state procedures. Federal courts have consistently interpreted the IDEA as requiring an educational program that will confer education benefit, not one that is optimal, the best or potential maximizing. North

Carolina courts have held that state law does not require public schools to develop a “utopian educational program for handicapped students any more than the public schools are required to provide utopian educational programs for non-handicapped students.” *Harrell v. Wilson County*, 58 N.C. App. 260, 265, 293 S.E.2d 687, 690 (1982).

5. Petitioners bear the burden of demonstrating that Respondent failed to provide *Student* with a free appropriate public education. *Weast v. Schaffer*, 377 F.3d 449 (4th Cir. 2004).
6. Petitioners have failed to show that *Student* is receiving an inappropriate education at High School A. The converse is true in that *Student* is receiving a free and appropriate public education. Indeed, the evidence shows that *Student*’s educational program meets or exceeds the requirements of state and federal special education laws. The IDEA and related state law require educational benefit, not perfection. See e.g., *Board of Educ. v. Brett Y.*, 1998 U.S. App. LEXIS 13702, at \*47 (4th Cir. June 26, 1998); *Harrell v. Wilson County*, 58 N.C. App. 260, 265, 293 S.E.2d 687, 690 (1982). *Student* is making significant progress in meeting IEP goals in her new class setting with her higher-functioning classmates.
7. Petitioners have failed to show that *Student* requires individualized swimming goals as part of her adaptive physical education or transition plan in order to receive a free appropriate public education.
8. The evidence is clear that Respondent gave full and meaningful consideration to all information and ideas provided by *Student* and her parents for inclusion of an aquatics element in her IEP.
9. Petitioners have failed to establish any other procedural violations of the IDEA or N.C.G.S. 115C, Article 9 or their implementing regulations by Respondent. Specifically, Petitioners did not show that Respondent failed to give them notice of placement decisions, failed to consider their requests that *Student* receive individualized swimming as part of her adapted physical education goals or her transition plan or otherwise denied Petitioners meaningful participation in the IEP development process for *Student*.
10. There is no procedural error by the failure of the Respondent to provide Respondent with a DEC 5 at the conclusion of the IEP meeting and in all respects Respondent properly provided the “prior written notice” as customarily contained in the DEC 5 and as required by applicable law. There is no other procedural error.

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that all of Petitioner’s claims are dismissed with prejudice.

## NOTICE

In accordance with the Individuals with Disabilities Education Act (as amended by the Individuals with Disabilities Education Improvement Act of 2004) cited as the IDEA, and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights.

In accordance with Federal law, 20 U.S.C. § 1415(f), the parents involved in a complaint "shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." A decision made in a hearing conducted pursuant to (f) that does not have the right to an appeal under subsection (g) may bring civil action in State court or a district court of the United States. *See* 20 U.S.C. § 1415(i). In accordance with 20 U.S.C. § 1415(g) "if the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in the hearing may appeal such findings and decision to the State educational agency."

The State educational agency shall conduct an impartial review of the findings and decision appealed. In accordance with 20 U.S.C. § 1415(h) "any party to a hearing conducted pursuant to subsection (f) . . . , or an appeal conducted pursuant to subsection (g) shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children disabilities; (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses; (3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and, (4) the right to written, or, at the option of the parents, electronic findings of fact and decisions."

Under State law, North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C-106.1 *et seq.*), and particularly N.C.G.S. § 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 (a contested case hearing). . . may appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board under G.S. 115C-107.2(b)(9) to receive notices." The State Board, through the Exceptional Children Division, shall appoint a Review Officer who shall conduct an impartial review of the findings and decision appealed.

"North Carolina has adopted a modified two-tier system, in which both levels are conducted by the State." Neither IDEA nor the federal regulations contemplate a situation in which a hearing conducted by the state will be appealed to the state. Therefore, in North Carolina, in which the hearing is conducted by the state and appealed to the state, the state review official's decision is considered the "official position of the state educational agency." *Wittenberg v. Winston-Salem/Forsyth County Board of Education*, 2006 WL 2568937 \*1 (Student D. N.C.)

The decision of the review officer which is the final official state agency decision is limited to whether the evidence presented at the OAH hearing supports the findings of fact and conclusions of law and whether the conclusions of law are supported by and consistent with 20

USC § 1415, 34 CFR §§ 300 and 301; GS 115C; the Procedures; and case law. In accordance with N.C. Gen. Stat. § 150B-36 the decision of the Administrative Law Judge shall be adopted unless it is demonstrated that the decision of the Administrative Law Judge is clearly contrary to the preponderance of the admissible evidence in the official record. The review officer must also consider any further evidence presented in the appeal process. In accordance with N.C. Gen. Stat. § 150B-36 each finding of fact contained in the Administrative Law Judge's decision shall be adopted unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the Administrative Law Judge to evaluate the credibility of witnesses. For each finding of fact not adopted, the reasons for not adopting the finding of fact and the evidence in the record relied upon shall be set forth separately and in detail. Every finding of fact not specifically rejected as required by Chapter 150B shall be deemed accepted for purposes of judicial review. For each new finding of fact that is not contained in the Administrative Law Judge's decision, the evidence in the record relied upon shall be set forth separately and in detail establishing that the new finding of fact is supported by a preponderance of the evidence in the official record.

Inquiries regarding further notices and time lines should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina.

This the 3rd day of March 2008.

Donald W. Overby  
Administrative Law Judge